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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

13 EBAY, INC.

14 Plaintiffs,

15 v.

16 DIGITAL POINT SOLUTIONS, INC., SHAWN
17 HOGAN, KESSLER'S FLYING CIRCUS,
18 THUNDERWOOD HOLDINGS, INC., TODD
19 DUNNING, DUNNING ENTERPRISES, INC.,
20 BRIAN DUNNING, BRIANDUNNING.COM,
21 AND DOES 1-20,

22 Defendants.

Case Number C 08-4052 JF (PVT)

**ORDER (1) DENYING MOTION
TO STAY CIVIL ACTION
PENDING RESOLUTION OF
CRIMINAL PROCEEDINGS AND
(2) GRANTING WITH LEAVE TO
AMEND MOTION TO STRIKE
ANSWER OF DEFENDANTS
KESSLER'S FLYING CIRCUS,
THUNDERWOOD HOLDINGS,
INC., AND BRIANDUNNINC.COM**

RE: Docket Nos. 125, 133-38, 140,
150-52, 158-60, 162-64

22 Defendants Digital Point Solutions, Inc. ("DPS"), Shawn Hogan (together "DPS
23 Defendants"), Kessler's Flying Circus ("KFC"), Thunderwood Holdings, Inc. ("THI"), Brian
24 Dunning, BrianDunning.com (together "BD Defendants"), and Todd Dunning and Dunning
25 Enterprises, Inc. (together "TD Defendants") seek to stay the instant civil action pending
26 resolution of related criminal proceedings. The DPS Defendants, BD Defendants (excepting
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Case No. C 08-04052 JF (PVT)

ORDER (1) DENYING MOTION TO STAY CIVIL ACTION PENDING RESOLUTION OF CRIMINAL
PROCEEDINGS AND (2) GRANTING WITH LEAVE TO AMEND MOTION TO STRIKE ANSWER OF
DEFENDANTS KFC, THI, AND BRIANDUNNINC.COM
(JFEX2)

KFC), and TD Defendants each have filed an independent motion to stay. Plaintiff eBay opposes the motions to stay, and moves to strike the answers to the Second Amended Complaint (“SAC”) of three Defendants – KFC, THI, and BrianDunning.com. Because the individual motions to stay are substantively similar, the Court will refer to them jointly. The Court has considered the moving and responding papers and the oral argument presented at the hearing on January 29, 2010. For the reasons discussed below, the motion to stay will be denied, and the motion to strike will be granted, with leave to amend.

I. BACKGROUND

Plaintiff eBay filed its initial complaint on August 25, 2008 against Defendants Brian Dunning, BrianDunning.com, Digital Point Solutions, Inc., Shawn Hogan, Kessler’s Flying Circus (“KFC”), Thunderwood Holdings, Inc. (“THI”), and Todd Dunning. Although these parties are referred to collectively by eBay and the Court as “Defendants,” the moving papers and statements filed by Defendants distinguish the “DPS Defendants”¹ from the “Non-DPS Defendants,”² and further separate the Non-DPS Defendants into two groups, the “BD Defendants” and “TD Defendants”.

In its Second Amended Complaint, filed on March 26, 2009, eBay alleges that Defendants engaged in a fraudulent “cookie stuffing” scheme that was designed to and did defraud eBay over a period of at least four years, in violation of both federal and California law, including the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, the federal Racketeer Influenced and Corrupt Organizations (“RICO”) statute, 18 U.S.C. § 1962(c), and various state laws. Cookie stuffing “is a term used to describe the forced placement of a cookie

¹ The DPS Defendants are Digital Point Solutions, Inc. and Shawn Hogan. DPS is a California corporation; it claims that it never did business with eBay and never was involved in eBay’s affiliate marketing program. Shawn Hogan is the sole officer, shareholder and director of DPS.

² The Non-DPS Defendants are entities solely owned and/or controlled by individual Defendants Brian Dunning and Todd Dunning. They are: Kessler’s Flying Circus (“KFC”), Thunderwood Holdings, Inc. (“THI”), Dunning Enterprise, Inc. (“DEI”), BrianDunning.com, and the individuals Brian Dunning and Todd Dunning. KFC, THI, BrianDunning.com, and Brian Dunning (the “BD Defendants”) have filed separate moving papers from DEI and Todd Dunning (“TD Defendants”). DEI and THI have a shared ownership interest as general partners in KFC. DEI is solely owned and/or controlled by Todd Dunning. THI is solely owned and/or controlled by Brian Dunning.

1 on a computer, typically by causing a cookie from a particular website to be placed on the user's
2 computer without the user knowing that he or she visited the website that placed the cookie."
3 (SAC 6)

4 Apart from this civil action, Defendants are under investigation by the United States
5 Attorney's Office ("USAO") and may face criminal charges relating to the alleged "cookie
6 stuffing" schemes. The USAO investigation began prior to the commencement of this action,
7 with a search of Todd Dunning's home on June 18, 2007 and seizure of all electronic equipment
8 located therein. The parties have informed the Court that they are not aware of any recent
9 change in the status of the criminal investigation, although Defendants assert that the USAO
10 confirmed in September 2009 that it had plans to issue an indictment by the early part of 2010.
11 As of January 11, 2010, the USAO had indicated to the DPS Defendants that it was not willing
12 to provide any further information.

13 Defendants argue that the criminal investigation and potential criminal action implicate
14 the Fifth Amendment rights of the individual Defendants, interfering with their ability to defend
15 the instant action on behalf of themselves and the corporate entities they own and control.
16 Defendants contend that a stay pending resolution of the criminal proceedings thus is
17 appropriate as to the individual and entity defendants.

18 Claiming a Fifth Amendment privilege on the basis of the ongoing criminal
19 investigation, the BD Defendants filed a joint answer to the SAC that contained no substantive
20 responses. eBay moves to strike the BD Entities' answer because the entities, as opposed to the
21 individual Defendant Brian Dunning, do not have a Fifth Amendment privilege. Although Brian
22 Dunning filed his answer jointly with the BD Entities, eBay does not seek to strike his answer.
23 With respect to the TD Defendants, DEI filed an answer to the SAC that did not attempt to
24 assert a Fifth Amendment privilege. For that reason, it is not subject to eBay's motion to strike.

25 The Court addressed similar Fifth Amendment concerns in an order filed January 12,
26 2010 ("Order"). This Order modified an earlier order issued by Magistrate Judge Trumbull on
27 November 19, 2009 in response to eBay's motion to compel certain discovery responses. The

1 Court found that a corporate defendant may not assert the constitutional privilege available to an
 2 individual defendant, even if the individual is the sole representative of the corporation.
 3 Defendants were ordered to respond to eBay's requests for production, interrogatories, and
 4 requests for admissions, if necessary by appointing an agent – who need not have firsthand
 5 knowledge of the underlying facts – to respond on their behalf. This is directly relevant to the
 6 motions presently before the Court.

7 II. DISCUSSION

8 A. Motion to Stay the Civil Action

9 It is within the court's discretion to stay civil proceedings “when the interests of justice
 10 seem to require such action.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.
 11 1995) (quoting *United States v. Kordel*, 391 U.S. 1, 12 n.27 (1970)). The decision is made “in
 12 light of the particular circumstances and competing interests involved in the case” and
 13 considering the “extent to which the defendant's Fifth Amendment rights are implicated.” *Id.* at
 14 324 (citing *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989)).
 15 Additional factors include: (1) the interests of the plaintiff in proceeding and the potential
 16 prejudice caused by a delay; (2) the burden that proceeding may place on defendants; (3) the
 17 convenience of the court in managing its case load; (4) the interests of third parties; and (5) the
 18 interest of the public in the pending civil and criminal proceedings. *Id.* at 324-35.

19 Implication of Defendants' Fifth Amendment Rights

20 Defendants' motions to stay turn upon the extent to which the individual defendants'
 21 Fifth Amendment rights are implicated in the civil action. *Keating* at 324. Defendants point to
 22 the similarity of the issues underlying the civil and criminal actions, the potential for prejudice
 23 in the criminal action, and the status of the criminal investigation. eBay argues that because no
 24 criminal action actually is pending, and the timing and scope of a potential indictment are
 25 unknown, any implication of Defendants' constitutional rights is largely speculative and
 26 insufficient to support a stay.

27 When simultaneous civil and criminal proceedings involve “the same or closely related
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facts,” the Fifth Amendment concerns may be sufficient to warrant a stay. *Chao v. Fleming*, 498 F. Supp 2d 1034, 1037 (W.D. Mich. 2007). Some courts have gone so far as to recognize the extent of the overlap as the “most important factor.” *See id.* at 1039. In this case, both actions spring from the “same nucleus of facts” pertaining to the cookie stuffing schemes. *See Continental Ins. Co. v. Cota* (N.D. Cal. 2008) 2008 WL 4298372; *Jones v. Conte* (N.D. Cal. 2005) 2005 WL 1287017. This aspect of the analysis thus favors Defendants, although the precise degree of overlap of factual and legal issues remains unknown in the absence of an actual indictment.

Defendants also contend that permitting the instant action to go forward may expose testimony and defenses relevant to the criminal case and expand the scope of criminal discovery beyond the limits of the Federal Rules. Defendants identify several ways in which the relationship between eBay and federal investigators could work to their disadvantage. eBay responds that this type of prejudicial risk is more likely in cases where the government is the real party in interest in both actions – a circumstance not present in this case. *See Chao* at 1038 (noting that a stay is “even more appropriate when both actions are brought by the government,” quoting *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1998)). However, the fact that the government is not a party to both proceedings need not serve as a basis for denying an otherwise appropriate stay. *See, e.g., Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum* (C.D. Cal. 2009) 2009 WL 2136986 at *6 (finding a six-month stay warranted against a private civil litigant, in part because pending litigation could “expose defendants’ strategy or theories with respect to the criminal case...”); *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 74 (W.D.N.Y. 2003) (noting the danger that “civil discovery will be used to circumvent criminal discovery limitations”).

Unlike *Chao*, this action is brought by a private plaintiff and presents less danger of prejudice to Defendants than if the government were involved in both proceedings. It is true that there is the potential for collaboration between the USAO and eBay, or for exposure of the Defendants’ defense theories. *See Taylor, Bean & Whitaker* at *6. However, as is discussed

below, the parties and the Court can taken protective measures to minimize risk of such prejudice. This factor thus is neutral.

The status of the criminal proceeding is crucial, though not determinative, in a court's decision whether or not to stay the civil case. When "no indictment has been returned" and no criminal action is underway, the case for a stay is much weaker. *Molinaro*, 889 F.2d at 903. The potential prejudice to a civil defendant facing a parallel criminal investigation is "more remote" than it is for an indicted defendant, and the delay to the plaintiff is "potentially indefinite." *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 577 (S.D.N.Y. 2001). At the same time, courts will not categorically deny a stay "solely because the defendant has not yet been indicted." *Chao*, 498 F. Supp 2d at 1038 (citing *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998)).

In *Molinaro*, the Ninth Circuit upheld the denial of a stay, noting that "[t]he possibility that criminal indictments would be brought ... may have made responding to civil charges more difficult" for the defendant, but the district court "did not abuse its discretion by deciding that this difficulty did not outweigh the other interests involved." 889 F.2d at 903. Similarly, in *Sterling Nat'l Bank*, the court found that defendants in a civil RICO action who also faced a criminal investigation could "point to nothing that suggests that the dilemma they face is more pointed or difficult than in any other case of parallel proceedings...." 175 F. Supp. 2d at 578. The *Sterling* court noted multiple problems with issuing a pre-indictment stay because it had no indication of whether the indictment was imminent and could not assess whether the scope of the grand jury investigation would expand beyond the "assumed ... substantial overlap" of issues. *Id*; see also *Applied Materials, Inc. v. Semiconductor Spares, Inc.* (N.D. Cal. 1995) 1995 WL 261451 at *3 (finding the defendant's Fifth Amendment privilege to be "far weaker" than if he had already been indicted, though not as "negligible" as when the defendant has given deposition in the case and potentially waived his privilege).

Other courts have assessed the issue differently, finding the implication of Fifth Amendment rights potent enough to warrant a stay. See *Chao*, 498 F. Supp 2d at 1040 (granting

the stay in part because “an indictment appears to be much more than some fanciful and far-off possibility”); *Walsh Securities*, 7 F. Supp. 2d at 527-28 (noting several ways in which proceeding with discovery in the civil case would cause defendants to assert Fifth Amendment privileges, even though those defendants had not yet been indicted); *Taylor, Bean & Whitaker*, 2009 WL 2136986 at *8-9 (citing “the mere possibility of criminal prosecution” as “all that is necessary for the Fifth Amendment privilege against self-incrimination to be invoked”) (citing *Matter of Seper*, 705 F.2d 1499, 1501 (9th Cir. 1983)).

The divergent district court decisions reflect the difficulty of assessing the strength of a civil defendant’s Fifth Amendment concerns when no criminal indictment has issued. Although Defendants in this case insist that an indictment is likely to come soon, neither they nor the Court know the timing and scope of the potential criminal charges. A stay at this juncture could result in a potentially indefinite delay of eBay’s ability to pursue its civil claims, while the implication of Defendants’ constitutional rights is still indeterminate. *See Sterling Nat’l Bank*, 175 F. Supp. 2d at 577. That said, the overlap between the civil and potential criminal actions, and the potential prejudice to Defendants’ criminal case in light of the USAO’s policy of working closely with the high-tech community, strengthen Defendants’ argument for a stay. On balance, the Court concludes that the Defendants have “significant, though not overwhelming” Fifth Amendment interests that must be considered in light of its analysis of the other *Keating* factors. *See Applied Materials*, 1995 WL 261451 at *3.

Other Keating Factors

_____The extent to which the pending civil action implicates the Fifth Amendment privilege of a defendant is “a significant factor,” but is “only one consideration to be weighed against others.” *Keating* at 326. As noted previously, the court also should consider: (1) the interests of the plaintiff in proceeding and the potential prejudice caused by a delay; (2) the burden that proceeding may place on defendants; (3) the convenience of the court in managing its case load; (4) the interests of third parties; and (5) the interest of the public in the pending civil and criminal proceedings. *Id.* at 324-25. These inquiries are especially fact specific, and courts’

1 treatment and weighing of the factors varies widely.

2 (1)-(2) Plaintiff's Interest and Defendants' Burden

3 The Court concludes that although Defendants face the burden of presenting their civil
 4 defense in a manner that protects the individual Defendants' Fifth Amendment rights, this
 5 burden does not outweigh eBay's interest in moving forward. Defendants argue that because
 6 they no longer are in business and cannot continue their allegedly fraudulent schemes, a stay
 7 would not result in any continuing harm to eBay. They suggest that any ongoing financial loss
 8 suffered by eBay during the course of the requested stay would not be "particularly unique,"
 9 because a monetary judgment with interest still would be available. *See Walsh Securities*, 7 F.
 10 Supp 2d at 528; *Jones v. Conte* (N.D. Cal. 2005) 2005 WL 1287017 (harms alleged by plaintiff
 11 may be adequately compensated even after a stay has lifted); *Taylor, Bean & Whitaker*, 2009
 12 WL 2136986 at *9 (plaintiff must put forth "evidence beyond mere speculation and argument
 13 that a delay in the civil case will make it more likely that the allegedly misappropriated funds
 14 will never be found"). They also contend that eBay already has access to all persons other than
 15 Defendants with knowledge of the underlying action, and has not specified how a stay would
 16 endanger eBay's ability to present its case. *See Chao*, 498 F. Supp 2d at 1040 (plaintiff offered
 17 no "specific examples" other than the vague contention that "fading memories and loss of
 18 documentation" would occur). In contrast, Defendants argue that they will be severely limited in
 19 their ability to mount a meaningful civil defense, and that the individual Defendants will be
 20 forced to make the "unpalatable choice" of defending the civil action at the risk of waiving their
 21 Fifth Amendment rights. *See Brock*, 109 F.R.D. 116, 120.

22 eBay contends that a stay will impede its discovery of other witnesses or evidence in
 23 support of its case and will "almost certainly prevent eBay from fully recovering its losses."
 24 (Opp'n., 14:13-16) A number of courts have recognized that "plaintiffs' interest in damages
 25 might not be adequately protected" if the court grants the stay, during which time defendant's
 26 remaining assets would be spent. *Applied Materials, Inc.*, 1995 WL 261451 at *2-3. This
 27 concern is compounded when there is no criminal action pending. *See Sterling National Bank*,

1 175 F. Supp. 2d at 579 (plaintiff's interests had been hampered by "defendants' dilatory tactics,"
 2 while lack of a criminal indictment made defendants' interests more speculative and uncertain).
 3 With respect to the burden of the present litigation on Defendants, eBay suggests less drastic
 4 ways in which the Court can protect Defendants' interests. For example, the individual
 5 Defendants can invoke the Fifth Amendment, as indeed they already have, and the Court can use
 6 protective orders to prevent disclosure of testimonial evidence to the federal government.
 7 Without knowing which Defendants will be indicted, and given that one Defendant (KFC) did
 8 not move to stay the civil action, eBay could be forced to pursue its civil case against some
 9 defendants, while awaiting completion of the criminal case against others. *See Paine, Webber,*
 10 *Jackson & Curtis, Inc.*, 486 F. Supp. at 1119 (finding that a stay would have affected plaintiff's
 11 ability to proceed against multiple defendants, only one of whom faced criminal charges).

12 A defendant "has no absolute right not to be forced to choose between testifying in a
 13 civil matter and asserting his Fifth Amendment privilege." *Keating* at 326; *see also Brock v.*
 14 *Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y. 1998). Although Defendants obviously are in a difficult
 15 position in that they are awaiting a potential criminal indictment, they are not unable to respond
 16 to allegations in the civil suit, and in fact they been ordered to do so by the Court in the Order of
 17 January 12, 2010. eBay's interest in preventing delay, accessing evidence, and seeking monetary
 18 judgment in the instant action is substantial. The fact that the time line for a criminal action is
 19 unclear strengthens eBay's argument that indefinite delay will harm its financial interests, and
 20 that Defendants may use the same funds that they allegedly obtained by fraud to support their
 21 defense. *See Sterling National Bank* at 579; *Applied Materials* at *2-3. Potentially criminal
 22 conduct should not serve as a "shield against a civil law suit and prevent plaintiff from
 23 expeditiously advancing its claim." *Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus,*
 24 *Inc.*, 486 F. Supp. 1118 (S.D.N.Y. 1980)

25 (3) Convenience of the Court

26 _____The Court has an interest in managing its cases efficiently. *Walsh Securities* at 528;
 27 *Sterling National Bank* at 580. Defendants argue that a stay would be efficient because

1 resolution of the criminal proceedings may narrow the issues for trial in the civil action, and at
 2 that point eBay will be able to proceed with discovery unimpeded. However, eBay argues
 3 persuasively that at this point any stay at this time would be of unknown duration, and the extent
 4 to which common issues would be resolved in a criminal proceeding is speculative when no
 5 criminal charges actually are pending.

6 (4)-(5) Interests of Third Parties and the Public

7 The fourth *Keating* factor – the interests of non-parties – is not relevant to the present
 8 analysis.³

9 As to the fifth factor, the Court concludes that proceeding with the civil case will best
 10 serve the interests of the public by “ensuring that aggrieved parties are made whole as rapidly as
 11 possible.” *See Starlight Int’l, Inc. v. Herlihy* (D. Kan. 1998) 1998 WL 560045 at *3; *see also*
 12 *Applied Materials* at *4. There are times in which “the public’s interest in the integrity of the
 13 criminal case” takes precedence over the interests of the civil litigant. *Javier H.*, 218 F.R.D. at
 14 75. However, proceeding with the instant civil case need not have the effect of undermining the
 15 integrity of the criminal investigation and any potential criminal action. Because the civil
 16 process can move forward as set forth in the Court’s Order of January 12, 2010, a stay is
 17 unnecessary to protect the interests of the public.

18
 19 **B. Motion to Strike the Answer of Defendants Thunderwood Holdings, Inc.,**
 20 **BrianDunning.com, and Kessler’s Flying Circus**

21 Pursuant to Federal Rule of Procedure Rule 12(f), the Court may strike “from any
 22 pleading any insufficient defense” Fed. R. Civ. P. 12(f). eBay moves to strike the BD
 23 Entities’ joint answer to the SAC, because the answer contains no substantive responses to the
 24 complaint. For the reasons set forth below, the Court will grant eBay’s motion to strike.

25 It is well-established that a corporation or business entity has no privilege under the Fifth

26
 27 ³ Commission Junction, the only other party of interest, already has released its claims against the
 Defendants.

Amendment. The Supreme Court has noted that “[a]ny claim of Fifth Amendment privilege asserted by the [corporate] agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege.” *Braswell v. United States*, 487 U.S. 99, 110 (1988); *see also United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995); *SEC v. Leach*, 156 F. Supp. 2d 491, 495 (E.D. Pa. 2001). For an individual, however, the privilege against self-incrimination extends to “questions put to him in any [] proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). This includes answers to questions that “would furnish a link in the chain of evidence needed to prosecute the claimant.” *Leach* at 493 (quoting *Ohio v. Reiner*, 532 U.S. 17, 121 (2001)).

Although the BD Entity Defendants cannot invoke Fifth Amendment privilege, they argue nonetheless that Brian Dunning’s invocation of his privilege extends to them, because any response by the entities would implicate Mr. Dunning in his individual capacity. Mr. Dunning is the sole shareholder, officer, and employee of Defendant THI, which together with Defendant DEI (solely owned by Todd Dunning)⁴, did business as KFC. According to the BD Defendants, “it is inconceivable that the Entity Defendants could respond to the allegations of the SAC without involving Mr. Dunning,” because he is the only individual who was involved with BD Defendants THI and BrianDunning.com, and Brian and Todd Dunning are the only individuals who were involved with BD Defendant KFC. (Opp’n., 12:1-3) A response by the BD Defendants’ to the SAC conceivably could form an evidentiary or factual link in a chain of evidence supporting an inference of Mr. Dunning and/or Todd Dunning’s criminal culpability. *See Leach* at 493; *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Courts have addressed this very problem by requiring the entity to appoint someone to answer the pleading who can do so without fear of self-incrimination, such as the corporation’s attorney. In *SEC v. Leach*, the court considered whether a business entity could be excused from

⁴ Todd Dunning also has asserted his Fifth Amendment privilege against self-incrimination.

1 answering the complaint “on the ground that the only individual with the knowledge required to
 2 answer . . . has invoked his Fifth Amendment privilege.” 156 F. Supp. 2d 491, 494. The court
 3 found that “[the defendant’s corporation] has the ability to designate someone else to answer the
 4 complaint without vitiating the defendant’s assertion of the Fifth Amendment privilege,” noting
 5 that if no other corporate officer exists, corporate counsel may answer. *Id.* at 497-98; *see also*
 6 *City of Chicago v. Reliable Truck Parts Co.*, 1989 WL 32923, at *3 (N.D. Ill. Mar. 31, 1989)
 7 (disagreeing with defendant that “an appropriate agent cannot be found” and noting that the
 8 agent “need not have ‘first-hand personal knowledge’ of the facts” set out in the answer).

9 In light of this authority, the BD Defendants’ assertion that the entity attorneys have no
 10 knowledge of the information sought by eBay and are not required to provide responses to the
 11 SAC is unpersuasive. The cases cited by the BD Defendants, such as *Central States, Southeast*
 12 *and Southwest Areas Pension Fund v. Carstensen Freight Lines, Inc.*, 1998 WL 413489 (N.D.
 13 Ill. 1998) do not support the proposition that a defendant entity reliant upon a single
 14 knowledgeable officer need not respond to the complaint. In *Carstensen*,⁵ the court upheld the
 15 defendant’s invocation of Fifth Amendment privilege *as to himself*, even though he had
 16 previously participated in the discovery process and produced corporate documents on behalf of
 17 his companies. *Id.* at *3. As to the corporation, however, the court rejected defendant’s
 18 argument that no other individual could verify the answers to interrogatories, finding that “the
 19 corporation’s attorney may also serve as an agent.” *Id.* at *4.

20 The prevailing case law suggests that a corporation cannot “secure for [itself] the
 21 benefits of a privilege it does not have” by selecting an agent who, for fear of self-incrimination,
 22 cannot respond on behalf of the corporation. *Carstensen* at *4 (quoting *United States v. 3963*
 23 *Bottles, More or Less, Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959), cert. denied,
 24 360 U.S. 931 (1959)); *SEC v. Leach*, 156 F. Supp. 2d 491 (E.D. Pa. 2001). The actions taken by
 25 the other entity Defendants in the instant action illustrate this point. DEI, whose sole

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 27 ⁵ *Carstensen* addresses a defendant’s invocation of the Fifth Amendment in response to discovery requests,
 not the pleadings.

representative is Todd Dunning, has provided an answer to the SAC that did not assert any Fifth Amendment privilege, even though Mr. Dunning as an individual has asserted the privilege. There is no reason the BD Entities cannot proceed in the same way.

III. DISPOSITION

(1) The motions to stay are DENIED without prejudice; and (2) the motion to strike is GRANTED, WITH LEAVE TO AMEND.

IT IS SO ORDERED

DATED: 2/25/2010


JEREMY FOGEL
United States District Judge